Supreme Court, U.S.
FILED

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IN THE

SUPREME COURT OF THE UNITED STATES

AUDREY S. WAGSTAFF, Petitioner,

vs.

THE UNITED STATES DEPARTMENT OF EDUCATION, Respondents,

On Petition For Writ of Certiorari To The United States Court Of Appeals For The Fifth Circuit

And

On Petition For Writ Of Certiorari
Motion to Review Violations of Protections and Constitutional Amendment Rights and Protections and to Suspend all Third Party Debt Collection Agencies Involvement in the collection of Government Debt

PETITION FOR WRIT OF CERTIORARI

MOTION FOR WRIT OF CERTIORARI

AUDREY S. WAGSTAFF
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Pro se

No. 07_____

IN THE SUPREME COURT OF THE

UNITED STATES

AUDREY S. WAGSTAFF, Petitioner,

v.

THE UNITED STATES DEPARTMENT OF EDUCATION, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

1. Is a government agency, specifically the United States Department of Education (Education), subject to or to what extend culpably liable for debt collected under their agency name, for the violations of the Fair Debt Collection Practices Act (15 U.S.C. § 1692) (FDCPA) when they contract out debt collection to third party debt collection agencies that are unequivocally subject to the FDCPA and can not perform the agenda set by the government agency, specifically Education, without the enforcement power of said agency, specifically Education, and said agency, specifically Education, does not perform their own agenda without the aid of the third party debt collection agency?

2. Are Education's debt collection practices a violation of (alleged) debtor's constitutional amendment rights?

3. Is the collection of alleged debt a waiver of Sovereign Immunity by the government agency?

4. Education is subject to what penalty and am I entitled to what compensation for violations of debt collection regulations, specifically Chapter IX, Title 31, in the collection of this alleged debt?

5. Are third party debt collectors accountable and to what extend liable for debt collected, including Administrative Wage Garnishments and income tax offset, under the name of government agencies, specially Education, when said third party debt collection agency violated federal statue, specifically the FDCPA, or other debt collection regulations in order for said government agency to collect the debt?

6. The United States Department of Justice and the Federal Court determined my student loan balance to be $0.00. Was this a legally enforceable debt?

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

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AUTHORITIES

1. S. Rep. No. 989, 95th Cong., 2d Sess. 29, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5815-16; *accord W. Va. Dep't of Fin. & Admin. v. Hassett (In re O.P.M. Leasing Servs.)*, 21 B.R. 993, 1001 (Bankr. S.D.N.Y. 1982)._____4

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[x] For Cases from Federal Courts: The opinion of the United States court of appeals at Appendix A to the petition and is unpublished.

[x] The opinion of the United States district court appears at appendix B to the Petition and is published.

JURISDICTION

[x] The date on which the United States Court of Appeals decided on my case was December 4, 2004

[x] No petition for rehearing was timely filed in my case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Subject to the Fair Debt Collection Practices Act (FDCPA)

Although the FDCPA15 U.S.C. § 1692 a (6)(C) excludes government employees performing their "official duties", in which the Appeals court cited in their Answer, it does not exclude the government agency. It is proven that Education contracts out debt collection to third party debt collection agencies, who are unequivocally subject to the Act, who are involved in all debt collection, including Administrative Wage Garnishments, herein AWG, and request to the United States Department of the Treasury, herein Treasury, as supported by the evidence.

Section 803 (6) (F), which defines Education as a debt collector, states, "of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts," and does not exclude government agencies.

Communications used to collect this alleged debt state that the debt collection is subject to the FDCPA and/or is from or refers to third party debt collectors as the proper contact agency, making Education debt collection subject to the Act, making

Education subject to the act, as the debt is collected under their name.

B. Violation of Constitutional Amendment Rights

Constitutional Amendment Rights V and XIV state that one can not be "deprived of life, liberty, or property without due process." Debt collected under The Debt Collection Improvement Act (DCIA) of 1996 is unconstitutional, as it does not provide due process, equal representation, a named unbiased judge or jury, state who determined the legitimacy of the debt or appeal rights.

Defenses and counterclaims are assessed through AWG "hearings." The AWG form, used to request a "hearing" to object to AWG, states, "This is an attempt to collect a debt and any information obtained will be used for that purpose," as required by the FDCPA. Education approves the AWG response, even in violation of alleged debtor's rights and protections.

Constitutional Amendment IX, states, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." As protections are already in place, including the FDCPA, it is a violation of ones 9th Constitutional Amendment Right to deny enforcement.

C. Sovereign Immunity

The Court of Appeals' Answer states that "A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text ... and will not be implied." However, it has been decided that sovereign immunity is waived when a government unit files a claim.

"...First, the filing of a proof of claim against the estate by a governmental unit is a waiver by that governmental unit of sovereign immunity with respect to compulsory counterclaims.." "Even where the governmental unit has not filed a formal claim, use of a self-help remedy to collect on the claim by the governmental unit may constitute an informal proof of claim sufficient to trigger the waiver provisions of 106(a) [*In re Town & Country Home Nursing Service, Inc.*, 963 F2d 1146 (CA9 1992)]. Education files a formal and an informal claim and the text is on point.

"For purposes of 106(a), a logical relationship exists when the counterclaim arises from the same set of operative facts as the initial claim in that the same operative facts serve as the basis for both claims or the aggregate core of facts upon which the claim rests activates additional legal rights otherwise dormant in the defendant." The use of a third party activated additional rights, specifically rights under the FDCPA.

It has not been cited, specifically by one with subject matter jurisdiction, that a

government agency retains sovereign immunity when they contract with a third party debt collection agency.

D. Violation of Chapter IX, Title 31, and the FDCPA

Education violated Title 31 Chapter IX, Part 901-STANDARDS FOR THE ADMINISTRATIVE COLLECTION OF CLAIMS, Sec. 901. 3 by collecting this alleged debt through AWG pass the 10 year statue of limitations.

Education also violated section 901.5, by collecting through the Treasury when a third party debt collector was involved in the attempts to collect the debt. Only debts that "are not subject to the requirement to transfer debts to Treasury for debt collection" can involve contracted debt collection agencies. Furthermore, the amount of listed debt on the AWG request sent to my employer is a violation of the privacy act.

Although The Appeals Court did not address these violations, the judicial system involvement is the most powerful recourse to address present and to prevent future violations against alleged debtors by government agencies.

E. Liability of third party debt collectors

The Appeals Court Answer states, "....(2) the debts the Department of Education collects are its own, not those due to a third party." This statement is not

comprehensive. Education added an additional 25% (plus additional interest) to the alleged debt to compensate third party debt collectors, who are paid from AWG payments collected through the Treasury before the government pays themselves.

It is unequivocally proven that contracted third party debt collectors are subject to the FDCPA. The contract with NCO Financial Systems, Inc. (NCO), states (Page 11, sec. 3.3), "The Contractor shall determine if the borrower is eligible for possible AWG in accordance with Ed procedures." It also states (Page 2, sec. 1.1) that they are to "prepare eligible cases for ... Administrative Wage Garnishments (AWG)...."

Education and third party debt collectors are liable for violations, as one does not collect alleged debt without the aid of the other.

F. Balance of $0.00

The United States Department of Justice, on behalf of Education, determined that my balance was zero and a Federal Judge agreed, before the case was dismissed. Both the Federal District Court and the Appeals Court avoided responding to this fact.

Education did not have any debt to collect. The AWG payments and income tax offsets should be returned immediately. A balance of $0.00 is a zero balance, making the "notice of legally enforceable debt" and

the actions of Education and Treasury a violation of a Court order.

STATEMENT OF THE CASE

On August 30, 1999, Education filed a lawsuit against me for collection of student loan debt. On October 6, 1999, I met with the United States Assistant District Attorney for the San Antonio Division and at that time, in writing disputed the debt. On May 24, 2000, the United States Department of Justice determined my balance to be $0.00. On May 30, 2000, the case was dismissed. In September 2004, a third party debt collection agency requested, in writing, repayment in full, on behalf of Education, with additional penalties and fees.

The conduct of NCO in the attempts to collect this alleged debt was the behavior that the FDCPA was designed to prevent.

Although Education is aware that the balance is zero and the case was dismissed, Education has placed an AWG on my income and has offset my income tax returns for since 2005 without reopening the case.

REASONS FOR GRANTING THE WIT

1. To Protect Alleged Debtors

Alleged debtors do have protections and Constitutional Amendment Rights, which are being violated by the DCIA of 1996 and the conscious acts of government agencies

and third party debt collectors, who are subject to the FDCPA, operating on their behalf. Not being able to have them addressed leads to increased violations. Education, while "enjoying their sovereign immunity," is part of the violations.

No one is in place to enforce the rights of alleged debtors. Even when they themselves attempt to have violations addressed, they are being "dismissed" by the Courts.

Granting the Wit would enforce the protections and rights of alleged debtors that they are already entitled to and are currently lacking.

2. Granting Access for Counter Claims, Violations and Defenses

On at least two occasions, Education referred me to a federal district Court. The Federal District Court and the Court of Appeals said that they lack subject matter jurisdiction, making it useless to file a request for rehearing.

Government agencies, including Treasury, should have ensured the legitimacy of the claim and that the rights of alleged debtors were not violated before any alleged debt was collected. Once the debt is collected, sovereign immunity is waived.

Granting the Wit would prevent some of the abuse of power being demonstrated by government agencies and third party

debt collectors collecting alleged debt on their behalf.

3. To Enforce Protections and Constitutional Amendment Rights

Many alleged debtors have legitimate counter claims and defenses against the allegations of owing student loan. "The Debt Collection Improvement Act of 1996 (DCIA) permits Federal agencies to garnish the pay of individuals who owe such debt without first obtaining a court order," as stated in the AWG request sent to my employer. Because alleged debtors lack proper due process and appeal rights, this Act is a violation. Nothing can replace due process.

The fear of repaying a loan that never stops growing and the reluctance of the judicial system to protect alleged debtors, makes it easier to financially plea bargain then to stand up for ones rights. One can appreciate that the structure was designed for this purpose, but the counter action has been for government units to interpret it as the 'need to not justify,' and to disregard alleged debtors rights and protections. This perpetuates a cycle of injustice.

Most alleged debtors are not attorneys and government agencies, as well as third party debt collectors have demonstrated that the rights of alleged debtors are of little significant to them.

Granting the Wit would enforce alleged debtors constitutional amendment rights and

debt collection protections and discontinue the one-side collection currently in place.

4. To Set A Precedent

The current rulings, although lacking subject matter jurisdiction, have set a dangerous Precedent. Third party debt collectors do not have a contract independent of Education and the fact of their involvement is conspicuously avoided.

Education's contract with third party debt collectors, specifically NCO Financial Systems Inc., and Title 31 (Federal Claims Collection Standards (Department of the Treasury—Department of Justice)) both state that contracted third party debt collectors are to abide state and local and federal debt collection regulations and specifically state the FDCPA. Education's contract with NCO Financial Systems, Inc., holds NCO liable for damages, demonstrating that Education is aware that the collection of debt, especially with the use of a third party, may lead to claims against the government unit.

The Wit would address how and to what extend government agencies, which contract out debt collection to non-government employees, are responsibility for violations that occur in the collection of their debt. It would determine the liability of third party debt collectors.

CONCLUSION

The petition for writ of certiorari should be granted.

Audrey S. Wagstaff

Audrey S. Wagstaff
Pro se

signing six promissory notes payable to various lenders. In May 1993, she graduated from Our Lady of the Lake University and has since been gainfully employed. Nonetheless, she has never made a single voluntary payment on her student loan debt, as the only payments have been by Treasury offsets in 1995, 1999, 2005, and 2006, and by administrative wage garnishment beginning in November 2005.

The Texas Guaranteed Student Loan Corporation ("TGSLC") guaranteed the student loans, which the Department of Education (the "DOE") reinsured using federal funds. Upon default, TGSLC paid the underlying claims to the various lenders, was reimbursed by the DOE, and assigned its rights and title to the DOE for collection purposes. On August 30, 1999, after unsuccessfully attempting to collect on the debt, the DOE filed suit in federal court seeking judgment on the unpaid student loans. For the first time, Appellant raised the issue of whether all six notes were valid. The DOE asked the U.S. Attorney's Office to dismiss the suit so that it could investigate Appellant's claims. The case was dismissed without prejudice.

Upon investigation, the DOE determined that all six notes were valid. In 2004, it resumed its efforts to collect the debt administratively by offsetting Appellant's tax refunds in 2005 and 2006. On November 11, 2004, Appellant sought an untimely request for review. On April 25, 2005, she sought a complete accounting of her student loan debt, which the DOE provided on May 3, 2005. On July 18, 2005, she sent the DOE two letters complaining about the tax refund offset, various collection methods, and the

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-50327

United States Court of Appeals
Fifth Circuit FILED December 4, 2007
Charles R. Fulbruge III Clerk

AUDREY S. WAGSTAFF- Plaintiff-Appellant
v.
UNITED STATES DEPARTMENT OF EDUCATION - Defendant- Appellee

Appeal from the United States District Court for the Western District of Texas

Before KING, BARKSDALE, and DENNIS, Circuit Judges. PER CURIUM:

The primary issue in this case is whether Congress waived the sovereign immunity of the United States by enacting the Fair Debt Collection Practices Act. We hold it did not and affirm the decision of the district court dismissing this case for lack of subject matter jurisdiction.

I. BACKGROUND FACTS

Between 1991 and 1993, Audrey Wagstaff, Appellant, took out student loans to attend Our Lady of the Lake University in San Antonio, Texas,

proposed garnishment of her wages. The DOE construed the letter as a request for a garnishment hearing. On September 13, 2005, the DOE upheld the garnishment of Appellant's wages.

On January 5, 2005, Appellant filed suit in federal court alleging a claim under the Fair Debt Collection Practices Act. The DOE filed a motion to dismiss, or in the alternative, for summary judgment. In granting the motion, the district court held that it lacked subject matter jurisdiction. It further found that to the extent that Appellant alleged a tort claim. She had not exhausted her administrative remedies. Finally, the district court concluded that Appellant failed to raise a genuine issue of material fact as to any of her claims and that the DOE was entitled to judgment as a matter of law. Appellant filed this timely notice of appeal.

II. LEGAL STANDARDS

In our de novo review of a motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction, "we apply the same standard as does the district court: '[A] claim may not be dismissed unless it appears certain that the plaintiff cannot prove any set of facts in support of her claim which would entitle her to relief.'" Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot & Wansbrough, 354 F.3d 348, 351 (5th Cir. 2003) (quoting Benton v.United States, 960 F.2d 19, 21 (5th Cir. 1992)) (alteration in original).

III. ANALYSIS

The Fair Debt Collection Practices Act (the "FDCPA"), a sub-chapter of the Consumer Credit

Protection Act, is intended to protect both debtors and non-debtors from misleading and abusive debt-collection practices. See 15 U.B.C. § 1692(e). The FDCPA subjects a debt collector to civil liability for failure to comply with any of its provisions. See 15 U.S.C. § 1692k(a). The FDCPA defines the term "debt collector" to mean "any' person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." See 15 U.S.C. § 1692a(6). The FDCPA specifically excludes from that definition "any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties." See 15 U.S.C. § 1692a(6)(C).

This issue of whether Congress waived the sovereign immunity of the United States by enacting the FDCPA is one of first impression for this court. 1"In order to hale the federal government into a court proceeding, a plaintiff must show that there has been a valid waiver of sovereign immunity." Lewis v. Hunt, 492 F.3d 565, 570 (5th Cir. 2007). "'A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text. . . and will not be implied.'" Id. (quoting Lane v. Pena, 518 U.S. 187, 192 (1996)). "'Moreover, a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign.'" Id. (quoting Lane, 518 U.S. at 192). "A statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text." Lane, 518 U.S. at 192."Absent a waiver of sovereign

immunity, the federal government is immune from suit." Lewis, 492 F.3d at 571 (citing Loeffler V. Frank, 486 U.S. 549, 554 (1988». Finally, "[t]he absence of such a waiver is a jurisdictional defect." Id.; see also Bodin v. Vagshenian, 462 F.3d 481, 484 (5th Cir. 2006) (holding that a lack of waiver of sovereign immunity "deprives federal courts of subject matter jurisdiction").

Here, Appellant is unable to cite a single provision in the FDCPA unequivocally and expressly waiving the Federal Government's sovereign immunity. Instead, she argues that the DOE waived its own sovereign immunity by acting through a third party to collect on her student loan debt, filing suit in 1999 to enforce judgment on her debt, and informing her that she had a right to

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1 At least three district courts -- albeit in unpublished opinions -- have concluded that the DOE cannot be sued under the FDCP A, though none expressly addressed the issue of whether the FDCPA contains a waiver of sovereign immunity. See DiXello l'. USDE, No. 06-C2763, 2006 WL 3783010, *1 n.2 (N.D. Ill. Dec. 21, 2006) (holding that DOE is not a debt collector under FDCPA, "which is a requirement both for a violation of§ 1692e and for liability under the Act"); Frew v Van Ru Credit Corp., Case No. 05-5297, 2006 WL 2261624, *3 (E.D. Pa. Aug. 7, 2006) ("The Court finds that Defendant Department of Education does not meet the definition of a debt collector under the FDCPA because: 0) the collection' of debts is not the primary purpose of the Department of Education, and (2) the debts the Department of Education collects are its o\\'n, not those due to a third party."); Burgess l'. USDE, Case No. 1:05.(,V-98, 2006 WL 1047064. *5 (D. Yt. Apr. 17, 2006) ("It is clear, however, that an action under the FDCPA cannot be brought against the [DOE].").

bring suit in federal court to seek review of the decision to garnish her wages.

We reject these arguments based on the longstanding principle that only Congress can waive an executive agency's sovereign immunity. See Drake v. Panama Canal Com., 907 F.2d 532, 534 (5th Cir. 1990); see also Army & Air Force Exch. Servo v. Sheehan, 456 U.S. 728, 734 (1982); Dahler v. United States, 473 F.3d 769,771 (7th Cir. 2007); Dunn & Black, PS. V. United States, 492 F.3d 1084, 1090 (9th Cir. 2007). Otherwise, because the FDCPA does not contain an unequivocal and express waiver of sovereign immunity, the district court correctly held that it lacked subject matter jurisdiction in this case. [2]

IV. CONCLUSION

For the foregoing reasons, the decision of the district court is affirmed.
AFFIRMED.

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2 To the extent that Appellant argues that her rights under the Fifth, Ninth. and Fourteenth Amendments have been violated, she does so for the first time on appeal. "It is well settled that we do not consider issues raised for the first time on appeal." Turner v. Baylor Richardson A/ed. Ctr., 476 F.3d :3:37, 341 n.3 (5th Cir. 2007) (citing Elvis Presley Enters.v. Capece, 111 F.3d 188, 193 n.2 (5th Cir. 1999)).

AO 450 (Rev. 5/99) Judgment in a Civil Case
Case 5:05-cv-01245 Doc 52 Filed 02/15/2007
Page 1 of 1
FILED FEB 15, 2007
CLERK U.S. DISTRICT COURT WESTERN DISTRICT OF TEXAS
"s/"_____DEPUTY CLERK

United States District Court
Western District of Texas

AUDREY S. WAGSTAFF, Plaintiff,
v.
UNITED STATES DEPARTMENT OF EDUCATION, Defendant

JUDGMENT IN A CIVIL CASE
CASE NUMBER: SA 05 CA 1245 PM
[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict

[&] Decision by Court. This action came on for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED
the United States Department of Education's motion to dismiss, or, in the alternative, motion for summary judgment is GRANTED and plaintiffs complaint is DISMISSED.

Clerk WILLIAM G. PUTNICKI
Date FEBRUARY 15,2007
Rosanne M. Garza (By) Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

AUDREY S. WAGSTAFF,
Plaintiff,
v.
UNITED STATES DEPARTMENT OF EDUCATION,
Defendant

CIVIL NO. SA-05-CA-1245-PM

MEMORANDUM DECISION AND ORDER

Pursuant to the consent of the parties to disposition before a United States Magistrate Judge[1] and consistent with the authority vested in United States Magistrate Judges pursuant to the provisions of 28 U.S.C. § 636(c) and Appendix C, Rule I (I) of the Local Rules for the Assignment of Duties to United States Magistrate Judges in the Western District of Texas, the following Memorandum Decision and Order is entered.

I. JURISDICTION

Plaintiff has alleged subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 15 U .S.C. §§ 1692 et seq. Defendant's motion to dismiss, or, in the alternative, motion for summary judgment challenges subject matter jurisdiction on the ground the United States has not waived its sovereign immunity for claims under the Fair Debt

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I Docket nos. 19-21.

'Collection Practices Act ("FDCPA") and, alternatively, to the extent plaintiffs use of words such as "negligence," "deception," "misrepresentation," and "defamation," imply she seeks to advance a tort claim under the Federal Tort Claims Act ("FTCA"), for the reason she has not exhausted her administrative remedies.

II. PROCEDURAL HISTORY

Plaintiff, Audrey S. Wagstaff ("plaintiff' or "Ms. Wagstaff'), initiated this law suit on December 29, 2005, when she filed her motion to proceed in forma pauperis and tendered a proposed complaint naming as the single defendant the United States Department of Education ("defendant" or "Department of Education").[2] Plaintiffs complaint asserts she is seeking a judgment finding the Department of Education violated the FDCPA in handling her student loans.[3] Specifically, plaintiff alleges: defendant "failed to appropriately apply [her] 1999 income tax offset;" "the interest (after 1999) penalties and/or fees charged to [her] account in 2005 are unfair" and the result of negligence on the part of the Department of Education due to their failure to proceed within a reasonable amount of time disputed the validity of the debt in 1999; defendant" used deception

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2 Docket nos. 1 and 5. Plaintiff filed a "motion to seal," which the Court denied in a January 5 ,2006 Order which also granted plaintiffs request to proceed in forma pauperis. See docket nos. 2, 3, and 4.

3 Docket no. 5 at 1.

and bad faith in the collection of this debt, "which led to the offset of her 2004 income tax and subsequent wage garnishments; and defendant "caused defamation of [her] character in the wage garnishment letter sent to [her] cmployer."[4] Plaintiffs three count complaint requests an "immediate cease and desists order" in addition to a temporary restraining order "to stop all wage garnishment and any future collection efforts up to the time the court issues a decision;" and "place an addition on her credit report that the loans are in legation and were disputed at the time they were placed on [her] credit report."[5] Finally, plaintiff seeks a judgment that defendant "failed to act in good faith and in accordance with the Fair Debt Collection Practices Act and thus financial compensation is owed to [her] for violation of [her] rights."[6] Plaintiff concludes her complaint by alleging defendant "is responsible for the reimbursement of the court cost and all other cost" that she incurs "due to this complaint."[7]

On January 10, 2006, the case was referred to the undersigned for disposition of all pretrial matters.[8] On February 10, 2006, plaintiff filed a

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4 Id.

5 Id. at 5.

6 Id. at 5. Plaintiff also requests interest, penalty charges and costs from after she "disputed the validity of the loan;" the Court to find her 1999 income tax offset was not properly applied to the balance of her debt; and for the Court to find the Department of Education misrepresented her signature in bad faith and therefore all actions taken against her, including the offset to her 2004 income tax and wage garnishment, "be deemed unlawful." Id.

7 Id. at 6.

8 Docket no. 6.

motion "[t]o have the U.S. Department 0f Education place a notice on my credit that the loan is in dispute,"[9] in addition to a motion to "[r]eceive a cease and desist order to stop wage garnishment by the U.S. Department of Education" and "[r]eceive a temporary restraining order to stop wage garnishment by the U.S. Department of Education."[10] On February IS, 2006, the Court issued an order striking with prejudice both of plaintiffs February 10, 2006 motions.[11] On March 15, 2006, plaintiff filed a motion for default judgment,[12] and on March 21, 2006, the Court issued an Order striking the motion without prejudice.[13] On April 11,2006, plaintiff filed another motion for default judgment,[14] and on April 17, 2006, the Court issued another Order denying the motion without prejudice.[15]

On June 19,2006, defendant filed an answer to plaintiffs complaint.[16] Defendant's answer essentially denies all of plaintiffs substantive allegations and raises the following affirmative defense:

> [t]o the extent plaintiff's complaint alleges [violations of the Federal Tort Claims Act ("FTCA"), she has not exhausted her administrative remedies as required by the FTCA . . . [t]o the extent plaintiffs complaint alleges a cause of action for defamation of character, such an action is excluded from the

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9 Docket no. 7.
10 Docket no. 8.
II Docket no. 9.
12 Docket no. II.
13 Docket no. 12.
14 Docket no. 13.
15 Docket no. 14.
16 Docket no. 17.

> FTCA in any event. . . [and][t]o the extent jurisdiction of plaintiff's complaint is based on the Fair Debt Collection Practices Act ("FDCPA"), jurisdiction is not present, since the DOE is not a debt collector as defined by the FDCPA.

Also on June 19, 2006, the Court issued a Scheduling Order, which, among other things, set an amended pleading deadline of July 31, 2006, a discovery deadline of November 6, 2006, and a dispositive motion deadline of November 20, 2006.[17] On July 17,2006, defendant consented to trial by the undersigned. [18] On July 18, 2006, plaintiff also consented pursuant to 28 U.S.C. Section 636.[19] On July 19,2006, United States District Judge Fred Biery entered an Order reassigning the case to the undersigned pursuant to the consent of Ms. Wagstaff and the Department of Education. [20]

On July 20, 2006, plaintiff filed an advisory informing the Court of a settlement offer she sent to dcfendant.[21] Also on July 20, 2006, plaintiff filed a motion to compel [22] and a motion to amend, which states she "would like to add to the lawsuit [her] request for such other and further relief as the Court may deem just and equitable. "[23] On July 28, 2006, defendant filed a response to plaintiff's motion to compel,[24] and on

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17 Docket no. 18
18 Docket no. 19
19 Docket no. 20
20 Docket no. 21.
21 Docket no. 22.
22 Docket no. 23.
23 Docket no. 24.
24 Docket no. 25

August 1,2006, plaintiff's motion to compel was denied.[25] On August 3, 2006, defendant filed a response to plaintiff's motion to amend,[26] and on August 4, 2006, the Court issued an Order granting plaintiff's motion.[27] In mid-August 2006, the parties submitted witness, exhibit, and expert lists,[28] and on October 24,2006, defendant filed a supplement adding one additional potential witness.[29] On October 25,2006, plaintiff filed a motion to amend the scheduling order in addition to her second motion to compel [30] On November 6, 2006, defendant filed responses to plaintiffs October 25th motions.}[31] On November 7, 2006, the Court issued an Order denying plaintiffs second motion to compel and an Order granting plaintiffs motion to amend the scheduling order.[32] The discovery deadline was reset to December 4, 2006, and the dispositive motion deadline was extended to December 18, 2006.[33]

On November 21, 2006, defendant filed a motion for protective order and motion to quash.[34] The motion to quash was granted and a protective order was entered on November 21,2006.[35] On December 4, 2006, plaintiff filed an

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25 Docket no. 26.
26 Docket no. 27.
27 Docket no. 28.
28 Docket nos. 29-32.
29 Docket no. 33.
30 Docket nos. 34 and 35
31 Docket nos. 36 and 37.
32 Docket nos. 38 and 39
33 Docket no. 39.
34 Docket no. 40.
35 Docket no. 41.

"address to the Court on the granting of the defendant's motion to quash and application for a protective order.,,[36] The Court construed the pleading as a motion to reconsider the November 21st Order, and plaintiffs motion was denied.[37]

On January 18, 2006, the Department of Education filed a motion to dismiss or, in the alternative, motion for summary judgment pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and 56.[38] On December 18,2006, the Court issued an Order directing plaintiff to respond to defendant's motion to dismiss or, in the alternative motion for summary judgment on or before' January 16, 2007.[39] On December 20, 2006, plaintiff filed a motion for extension of time to file a response to defendant's motion, and on December 21,2006, the Department of Education filed an answer to plaintiffs motion, asserting it was unopposed to an extension oftime.[40] Also on December 21, 2006, the Court issued an Order granting plaintiffs request for additional time to file a response to defendant's motion, and noted plaintiff should respond on or before January 29, 2007.[41] On January 29, 2007, plaintiff filed a response to defendant's motion to dismiss or, in the alternative, motion for summary judgment. [42] On February 8, 2007, defendant filed a reply to plaintiff's response.[43]

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36 Docket no. 42
37 Docket no. 43.
38 Docket no. 44.
39 Docket no. 45.
40 Docket no. 47.
41 Docket no. 48.
42 Docket nos. 49.
43 Docket no. 50.

III. FACTUAL SUMMARY

The following factual allegations, derived from plaintiff's complaint are set out to provide a context to defendant's challenge to the Court's subject matter jurisdiction and are accepted as true when considering defendant's motion to dismiss for failure to state a claim:[44]

Plaintiff took out student loans while at Our Lady of the Lake University in San Antonio, Texas, between 1991 and 1993 as she signed six promissory notes payable to the lender.[45] Plaintiff loaned a total of $17,000.00 from January 17, 1991, and January 12, 1993.[46] and thereafter has been gainfully employed.[47] Plaintiff graduated from Our Lady of the Lake in May 1993, Ms. Wagstaff has never made a voluntary payment on her student loan debt, as the only payments have been by Treasury offsets in 1995, 1999, 2005, and 2006, and by administrative wage garnishment beginning in 2005.[48] Because the student loans were guaranteed by the Texas Guaranteed Student Loan Corporation ("TGSLC") and then reinsured by the Department of Education under federal loan guaranty programs, in August 1995, after the

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44 Defendant alternatively has moved for summary judgment, arguing that even if it were subject to the FDCPA, it did not violate that statute. Docket no. 44 at 7-10. The discussion of the propriety of summary judgment is based on facts which the Court finds undisputed, as set out in Section VI (B)(3), below.

45 Docket no. 44, exhibits 1-6.

46, Id.

47 Id. exhibit 7 at II: 1-13 ("Wagstaff Deposition of November 2, 2006").

48 Id. at 11:25-12:6.

TGSLC was unable to collect from plaintiff, it assigned its right and title to the loans to the Department of Education.[49]

Defendant attempted to collect the loan balance and on August 30, 1999, acting through the United States Attorney's Office, the Department of Education filed a complaint in the Western District of Texas against plaintiff seeking judgment on the unpaid student loans.[50] On October 6, 1999, plaintiff met with a representative of the U.S. Attorney's Office and for the first time she raised the subject of the validity of the six notes.[51] The case was dismissed without prejudice on May 30, 2000, but after the dismissal of the case, the Department of Education was unable to confirm plaintiff's contention that one of the six notes was a duplicate and plaintiff never produced evidence to support her claim.[52]

The Department of Education resumed efforts to recoup its losses in 2004, as plaintiffs wages were administratively garnished beginning in November 2005, and her tax refunds were offset in 2005 and 2006.[53] On or about November 11, 2004, plaintiff filed a Request for Review, which is an objection to the agency's utilization of a

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49 &, exhibit 8 ("Declaration of S.Dawn Scaniffe"). TGSLC was required to pay a claim to the bank and was reimbursed for that claim payment by the Department of Education.

50 See United States v. Wagstaff, Case No. SA-99-CA-960-0G, docket no. 1.

51 Wagstaff Depositions at 49:4-13.

52 See Case No. SA-99-CA-960-0G, docket no. 3; docket no. 44, exhibit 9 ("Declaration of Charlotte Robinson pursuant to 28 U.S.C. § 1746").

53 See docket nos. 5 and 49.

Treasury offset of an income tax refund. [54] Plaintiff hearing. [55] On or about April 25, 2005, plaintiff sent a letter to the Department of Education in which she claimed she had previously disputed her student loans and wanted a complete s request was deemed untimely, so the Department of Education found she was not entitled to accounting. [56] On or about May 3, 2005, defendant responded to plaintiff's letter and included an accounting of her loan [57] On or about July 18, 2005, plaintiff sent the Department of Education two letters in which she raised concerns over not receiving a hearing, the implementation of a 2004 tax refund offset, the collection methods used by NCO Financial Systems, Inc., and of the proposed, at that time, garnishment of her wages.[58] Plaintiff's second letter dated July 18,2005, requested a hearing and the Department of Education, on September13, 2005, issued a Garnishment Hearing Decision upholding the garnishment of her wages and rejecting all of plaintiffs other claims at least in part because she never submitted any information to support her claim. [59] Plaintiff initiated this suit on December 29, 2005.[60]

IV. ISSUES

1. Whether the Court has subject matter jurisdiction over plaintiff's claims; and

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54 Docket no. 44, exhibit 10.
55 Id. at 3.
56 Id., exhibit II.
57 Id. exhibit 12.
58Id exhibit 13.
59 Id; id., exhibit 14.
60 Docket no. 5.

refund offset, the collection methods used by NCO Financial Systems, Inc., and of the proposed, at that time, garnishment of her wages.[58] Plaintiff's second letter dated July 18,2005, requested a hearing and the Department of Education, on September 13, 2005, issued a Garnishment Hearing Decision upholding the garnishment of her wages and rejecting all of plaintiffs other claims at least in part because she never submitted any information to support her claim. [59] Plaintiff initiated this suit on December 29, 2005.[60]

IV. ISSUES

1. Whether the Court has subject matter jurisdiction over plaintiff's claims; and

2. Whether there is any genuine issue as to any material fact to show the Department of Education violated the FDCPA.

V. STANDARDS

A. THE FEDERAL TORT CLAIMS ACT

"It is elementary that the United States, as sovereign, is immune from suit save as it consents to be sued. . . and the terms of its consent to be sued in any court define that

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58Id exhibit 13.
59 Id; id., exhibit 14.
60 Docket no. 5.

court's jurisdiction to entertain the suit."[61] Through the FTCA, Congress has provided a limited waiver of sovereign immunity, allowing the United States to be sued for injuries resulting from certain tortuous acts committed by employees of the Government acting within the scope of theiremployment.[62] In order to bring a tort claim against the United States, however, a plaintiff must exhaust administrative remedies prior to filing suit, or the case is subject to dismissal.[63] As a waiver, the FTCA must be strictly construed and all ambiguities resolved in favor of the United States.[64] If the acts at issue were not committed by a Government employee, the case must be dismissed for lack of subject matter jurisdiction pursuant to Rule 12(b)(1).[65]

B. FEDERAL RULE OF CIVIL PROCEDURE

As federal courts have limited jurisdiction, the court must diligently assure

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61 United States v. Mitchell, 445 U.S. 535, 538,100 S.Ct. 1349,1351 (1980); Linkous v. United States, 142 F.3d 271, 275 (5th Cir. 1998); Broussard v. United States, 989 F.2d 171, 174 (5th Cir. 1993).

62 28 U.S.c. § 1346(b)(1).

63 28 U.S.c. § 2675(a); McNeil v. United States, 508 U.S. 106, 112, 113 S.Ct. 1980, 1983-1984 (1993).

64 Linkous, 142 F.3d at 275 (citing United States v. Nordic Village, Inc., 503 U.S. 30,33, 112 S.Ct. 1011, 1014 (1992)).

65 Herbert v. United States, 438 F.3d 483, 483 (5th Cir. 2006); Linkous, 142 F.3d at 275; Broussard, 989 F.2d at 177.

itself that it has the power to adjudicate the claims before it. "A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case."[66] Motions filed under Rule 12(b)(1), Federal Rule of Civil Procedure, permit a party to challenge the subject matter jurisdiction of a federal court to hear a case. When subject matter jurisdiction has been challenged by a Rule 12(b)(l) motion to dismiss, the burden for establishing the federal court's jurisdiction is on the party asserting jurisdiction.[67] Accordingly, plaintiff constantly bears the burden of proof that jurisdiction does in fact exist.[68]

A federal court may dismiss a complaint for lack of subject matter jurisdiction based on: "(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts."[69] A facial attack on subject matter jurisdiction requires the court to decide if the plaintiff's complaint

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66 Home Builders Ass'n of Miss., Inc. v. City of Madison, Miss., 143 F.3d 1006,1010 (5th Cir. 1998) (quoting Nowak v. Ironworkers Local 6 Pension Fund, 81 F.3d 1-182, 1187 (2d

67 McDaniel v. United States, 899 F.Supp. 305, 307 (E.D. Tex. 1995), aff'd, 102 F.3d 551 (5th Cir. 1996).

68 Menchaca v. Chrysler Credit Corp., 613 F.2d 507, 511 (5th Cir.), cert. denied 449 U.S 953,101 S.Ct. 358 (1980).

69 Williamson v. Tucker, 645 F.2d 404, 413 (5th Cir.), cert. denied 454 U.S. 897, 102 S.Ct. 396 (1981); see Barrera-Montenegro v. United States, 74 F.3d 657,659 (5th Cir. 1996).

has correctly alleged a basis for subject matter jurisdiction. [70] Such an attack is valid if from the face of the pleadings, the court can determine it lacks subject matter jurisdiction.[71] Ultimately, a motion to dismiss for lack of subject matter jurisdiction should be granted only if it appears certain from the face of the complaint that plaintiff cannot prove any set of facts in support of his or her claim that would entitle him or her to relief.[72] When a Rule 12(b)(I) motion attacks the lack of subject matter on the face of the complaint, the motion is analyzed under the same standard as a motion to dismiss under Rule 12(b)(6)[73] in that all factual allegations in the complaint must be taken as true and construed favorably to the plaintiff. [74]

In deciding a Rule 12(b)(I) motion, a federal court may consider the facts in the record, whether disputed or undisputed.[75] But, a Rule 12(b)(1) motion based on evidence in the record, also termed a factual attack, does not accept as true the factual allegations in the live complaint. [76] Factual attacks challenge "the existence of subject matter in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and

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70 Venture I, Inc. v. Orange County, Tex., 947 F.Supp. 271, 276 n. 7 (E.D. Tex. 1996).

71 Id.

72 Home Builders Ass'n., 143 F.3d at 1010.

73 Id..

74 Williamson, 645 F.2d at 412.

75 Id. at 413.

76 Id.

affidavits are considered."[77] Unlike a Rule 12(b)(6) motion, a Rule 12(b)(l) motion is not converted to a summary judgment when a court considers matters outside the complaint.[78] This is true because:

> [A]t issue in a factual12(b)(I) motion is the trial court's jurisdiction -- its very power to hear the case -- there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to plaintiffs allegations, and the existence of disputed material facts will not preclude the trial court from evaluating the merits of jurisdictional claims.[79]

C. FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)

Under Federal Rule of Civil Procedure 12(b)(6), plaintiff must state a claim upon which relief can be granted or the complaint may be dismissed with prejudice as a matter of law. A motion to dismiss under Rule 12(b)(6) "is viewed with disfavor and is rarely granted."[80] When considering a motion to dismiss for failure to state a claim, all factual

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77 Garcia v. Copenhaver, Bell & Assoc., M.D.'s P.A., 104 F.3d 1256, 1261 (IIth Cir.1997) (quoting Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3rd Cir. 1977)); see also Williamson, 645 F.2d at 413 (explaining federal court "may hear conflicting written and oral evidence and decide for itself the factual issues which determine jurisdiction").

78, Williamson, 645 F.2d at 412.

79 Id at 413 (quoting with approval Mortensen, 549 F.2d at 891 (emphasis added)).

allegations in the complaint must be taken as true and construed favorably to the plaintiff.[81] The United States Supreme Court has elaborated:

> Nothing in Rule 12(b)(6) confines its sweep to claims of law which are obviously insupportable. On the contrary, if as a matter of law "it is clear that no relief could be proved consistent with the allegations," a claim must be dismissed, without regard to whether it is based on an outlandish legal theory or on a close but ultimately unavailing one.[82]

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.[83] Conclusory allegations or legal' conclusions masquerading as factual

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80 Kaiser Aluminum & Chern. Sales, Inc. v. Avondale, 677 F.2d 1045, 1050 (5th Cir.), cert. denied, 459 U.S. 1105,103 S.Ct. 729 (1982) (quoted in Capital Parks, Inc. v. Southeastern Advertising & Sales Sys., Inc., 864 F.Supp. 14, 15 (W.O. Tex. 1993), affirmed, 30 F.3d 627 (5th Cir. 1994)).

81 Fernandez-Montez v. Allied Pilots Assoc., 987 F.2d 278,284 (5th Cir. 1993). See Capital Parks, Inc., 30 F.3d at 629 ("A court's decision to dismiss for failure to state a claim may be upheld 'only if it appears that no relief could be granted under any set of facts that could be proven consistent with the allegations.' Baton Rouge Bldg. & Constr. Trades Council AFL-CIO v. Jacobs Constructors, Inc., 804 F.2d 879, 881 (5th Cir. 1986).") See also O'Quinn v. Manuel, 773 F.2d 605,608 (5th Cir. 1985).

82 Neitzke v. Williams, 490 U.S. 319, 327,109 S. Ct. 1827,2232 (1989) (quoting Hishonv. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229,2232 (1984)).

conclusions will not suffice to prevent a motion to dismiss.[84] This is a rigorous standard, but subsumed within it is the requirement that a plaintiff state its case with enough clarity to enable the court and the opposing party to determine whether a claim is alleged.[85]

D. FEDERAL RULE OF CIVIL PROCEDURE 56

The standard to be applied in deciding a motion for summary judgment is set forth in Federal Rule of Civil Procedure 56, which provides in pertinent part as follows:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter oflaw.[86]

Mere allegations of a factual dispute between the parties will not defeat an otherwise proper motion for summary judgment. Rule 56 requires that there be no genuine issue of material fact.[87] A fact is material if it might affect the outcome of the lawsuit under the

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83 Conley v. Gibson, 355 U.S. 41, 45-46,78 S.Ct. 99,102 (1957).

84 Jefferson v. Lead Indus. Ass'n, Inc., 106 F.3d 1245, 1250 (5th Cir. 1997); Tuchman v. DSC Communications Corp., 14 F.3d 1061,1067 (5th Cir. 1994); Fernandez-Montes, 987 F.2d at 284.

85 Elliott v. Foufas, 867 F.2d 877, 880 (5th Cir. 1989).

86 FED. R. Cry. P. 56(c); Cclotcx Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986).

governing law.[88] A dispute about a material fact is genuine if the evidence is such that a reasonable trier of fact could return a verdict for the nonmoving party.[89] Therefore, summary judgment is proper if, under governing laws, there is only one reasonable conclusion as to the verdict; if reasonable finders of fact could resolve a factual issue in favor of either party, summary judgment should not be granted.[90]

The movant on a summary judgment motion bears the initial burden of providing the court with a legal basis for its motion and identifying those portions of the record which it alleges demonstrate the absence of a genuine issue of material fact.[91] The burden then shifts to the party opposing the motion to present affirmative evidence in order to defeat a properly supported motion for summary judgment.[92] All evidence and inferences drawn from that evidence must be viewed in the light favorable to the party resisting the motion for summary judgment.[93] Thus, summary judgment motions permit the Court to resolve

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87 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247,106 S.Ct. 2505,2510 (1986).
88 Anderson, 477 U.S. at 248, 106 S.Ct. at 2510; Alexander v. Eeds, 392 F.3d 138, 142 (5 th Cir. 2004).
89 Anderson, 477 U.S. at 248,106 S.Ct. at 2510; Chiu v. Piano Independent School District, 339 F.3d 273, 282 (5th Cir. 2003) (quoting Lukan v. North Forest Indep. Sch. Dist., 183 F.3d 342, 345 (5th Cir.I999)).
90 Anderson, 477 U.S. at 249,106 S.Ct. at 2510-11.
91 Celotex Corp., 477 U.S. at 323, 106 S.Ct. at 2553.
92 Anderson, 477 U.S. at 257, 106 S.Ct. at 2514.
93 Macc, 333 F.3d at 623 (citing Little, 37 F.3d at 1075).

lawsuits without the necessity of trials if there is no genuine dispute as to any material facts and the moving party is entitled to judgment as a matter of law.[94] The movant may satisfy the burden to show the "absence of a genuine issue of material fact by pointing out that the record contains no support for the non-moving party's claim."[95] If non-movant cannot provide some evidence to support its claim, summary judgment is appropriate.[96]

VI. ARGUMENTS AND ANALYSIS

A. SUMMARY OF ARGUMENTS

Defendant has moved to dismiss or, alternatively, for summary judgment asserting, in sum, that it may not be sued under the FDCPA due to sovereign immunity and inapplicability of the statute and even if it could, the facts of the case prove the Department of Education did not violate the statute.[97] More specifically, defendant contends that plaintiff's FDCPA claim should be dismissed because: the FDCPA contains no waiver of sovereign immunity such that the Court lacks subject matter jurisdiction; and the Department of Education does not meet the definition of "debt collector" under the Act,

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94 See Am. Home Assurance Co. v. United Space Alliance, LLC, 378 F.3d 482, 486 (5th Cir. 2004).
95 Stahl v. Novartis Pharmaceuticals Corp., 283 F.3d 254, 263 (5th Cir), cert. denied, 537LJ.S. 824,123 S.Ct. III (2002).
96 Stahl, 283 F.3d at 263
97 Docket no. 44 at 4-7.

federal officials are expressly excluded under the FDCPA, federal agencies should also be deemed excluded from the Act, such that plaintiff has failed to state a claim for relief under the FDCPA, [98] In support, defendant asserts that one of the FDCPA's "sister" statutes has been held to exclude federal agencies.[99] Defendant additionally maintains that to the extent plaintiff's use of certain words indicates she has asserted a tort claim, she has not exhausted her administrative remedies. [100] Finally, in the alternative, defendant argues that even if sovereign immunity is not applicable and even if the Department of Education is subject to the FDCPA, summary judgment is appropriate because, it did not violate the FDCPA.

In response, plaintiff disputes many of defendant's factual allegations. [101] and argues sovereign immunity does not apply because: the FDCPA does not expressly exclude federal agencies from the definition of "debt collector;" the Tucker Act waives sovereign immunity; the United States once brought suit against her to collect on the note; and the agency consented to suit. [102] Plaintiff further argues the Administrative Wage Garnishment Hearing Decision signed by Ms. Charlotte Robinson was arbitrary, capricious, and contrary to established law because Ms.

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98 & at 5 (citing the FDCPA at 15 U.S.C. § 1692 et seq).
99 Id.
100 Id. at 7.
101 Docket no. 49 at 1-6.
102 Id. at 6-19.

Robinson may have been carrying out the wishes of the contractor or finding in favor of the agency because the agency is Ms. Robinson's employer.[103] Plaintiff further argues she has made valid tort claims in addition to her valid FDCPA claim.[104]

Plaintiff argues the Department of Education uses Contract Authorized Collection Agencies ("CACA"), but NCO Financial Systems, Inc., and NCO Financial Systems, Inc. was required to comply with all applicable federal and state laws relating to debt collection.[105] Plaintiff thus asserts that "[i]f the CACA have to abide by the FDCPA, then inherently so would [defendant]."[106] Plaintiff, in further addressing the relationship between the Department of Education and NCO Financial Systems, Inc., claims "[a]11 actions resulting from an unlawful act are themselves also unlawful."[107] With respect to defendant's assertion that plaintiff did not exhaust her administrative remedies, plaintiff asserts representatives of the Department of Education never informed her of her right to file an administrative tort claim.[108] She further contends the Department of Education "refused to provide any records of communication between DOE employees claiming 'attorney-client' and 'work product'

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103. Id. at 12- I 4.
104 Id. at 15-19.
105 Id. at 7-8.
106 Id. at 8.
107 Id.
108 Id. at II.

privileges" and "[i]f these communications were used for the purpose of committing a tort, then they are not protected."[109]

In reply, the Department of Education argues that plaintiffs arguments that defendant is subject to the FDCPA are without legal merit. [110] Further, the Department of Education reiterates its claim that plaintiff has failed to exhaust her administrative remedies with regard to any possible tort claims.[111] Finally, defendant contends plaintiffs allegations regarding the validness of the Administrative Wage Garnishment Hearing Decision "is rank speculation."[112]

B. ANALYSIS

1. The Fair Debt Collection Practices Act

The purpose of the FDCPA, effective on March 28, 1978, is "to protect consumers from a host of unfair, harassing, and deceptive debt collection practices without imposing unnecessary restrictions on ethical debt collectors." [113] The FDCPA seeks "to eliminate abusive debt collection practices by debt collectors."[114] The statute contains no express waiver of sovereign immunity. The statute defines "debt collector" as "any person who uses any instrumentality of interstate

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109 Id. at 12

110 Docket no. 50 at 1-3.

111 Id. at 3.

112 Id. at 4.

113 S. REP. No. 95-382, at 1-2 reprinted in 1977 U.S.C.C.A.N. 1695, 1696. 114 15 U.S.C. § 1692(e).

114 15 U.S.C. § 1692a(6).

commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another."[115] The statute provides for six exclusions from the definition of "debt collector," including an express exclusion of "any officer or employee of the United States" who is collecting a debt in the performance of official duties. [116]

As its threshold argument, defendant argues that the United States has not waived its sovereign immunity to permit suit under the FDCPA. It is settled law that waivers of sovereign immunity must be set forth explicitly and expressly.[117] The Government notes there is no case on point, but the language of the FDCPA contains no waiver of sovereign immunity. The FDCPA expressly excludes employees of the federal and state governments from the purview of the Act such that it is reasonable to conclude, as defendant asserts, that agencies of the federal and state governments are also exempt as they can only act through employees. Additionally, court have held that federal agencies are not subject to the Fair Credit Reporting Act, a companion statute and another subtitle of the Consumer

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115 15 U.S.C. § 1692a(6)(C).

116 15 U.S.C. § 1692a(6)(C).

117 E.g., United States Y. Orleans, 425 U.S. 807,814,96 S.Ct. 1971,1976 (1976):Almendariz-Mata v. United States Dept. of Justice, Drug Enforcement Admin., 83 F.3d 6769, 682 (5th Cir. 1996); Wilkerson Y. v. United States , 67 F.3d 112, 118 (5th Cir. 1995).

Credit Protection Act. [118] Although, as plaintiff argues, the Government has waived sovereign immunity under the Tucker Act for certain non-tort claims, plaintiff brought this suit under the FDCPA, not the Tucker Act Moreover, the original jurisdiction for Tucker Act claims is with the United States Court of Federal Claims, not this court. [119]

Further, the Department of Education does not meet the definition of "debt collector" within the scope of the FDCPA as it is not principally in the business Of collecting debt and is the creditor of plaintiff and, therefore, is not attempting to collect a debt owed to another.[120] "The FDCPA applies only to persons whose primary business is debt collection, who regularly collect debts for others, or who use another person's name to

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118 E.g., Ollestad v. Kelley, 573 F.2d I 109 (9th Cir. 1978).

119 28 U.S.C. § 1491(a)(1). The Court also rejects plaintiffs associated arguments that the Department of Education waived its immunity by suing plaintiff on the notes in 1999 and that the immunity was waived by consent when the agency advised her of her rights to appeal agency determinations.

120 Plaintiff does argue the Department of Education charges a "collection fee" for Administrative Wage Garnishment monies and a "fee for income tax offset," but fails to demonstrate how the Department of Education meets the definition of "debt collector" in the statute. See docket no. 49. Plaintiff instead attempts to hold the Department of Education liable for the actions of NCO Financial Systems, Inc., a non-party to this case. Id. Plaintiff cites no authority for her proposition that the Department of Education can be considered a debt collection agency because of the actions of one of its contractors.

collect debts."[121] Congress established the Department of Education on May 4, 1980 through the Department of Education Organization Act.[122] The Department of Education's principal purpose is not debt collection.[123] Further, here the Department of

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121 Markctic v. U.S. Bank Nat'l Assoc., 436 F. Supp. 2d 842, 854 (N.D. Tex. 2006).

122 See THE DEPARTMENT OF EDUCATION ORGANIZATION ACT, Public Law 96-88, October 17, 1979, 93 Stat. 668.

123 According to its website, the Department of Education's mission is to: strengthen the federal commitment to assuring access to equal educational opportunity for every individual; supplement and complement the efforts of states, the local school systems and other instrumentalities of the states, the private sector, public and private nonprofit educational research institutions, community-based organizations, parents, and students to improve the quality of education; encourage the increased involvement of the public, parents, and students in federal education programs; and promote improvements in the quality and usefulness of education through federally supported research, evaluation, and sharing of information; improve the coordination of federal education programs; improve the management of federal education activities; and increase the accountability of federal education programs to the President, the Congress, and the public. See Department of Education, Overview, Mission available at http://www.cd.gov/about/overview/mission/mission.html ?src=ln (Feb. 12,2007). Further, in a section of its website entitled "What does the Department of Education do? ," the text lists three purposes of the Department of Education: establish policies relating to federal financial aid for education, administer distribution of those funds, and monitor their use; collect data and oversee research on America's schools and disseminate this information to educators and the

general public; and identify the major issues and problems in education and focus national attention on them. See Department of Education, Overview, "What does the Department of Education do?" available at http://www.ed.gov/about/overview/focus/whatyg4.html# whatdoes (Feb. 12, 2007).

Education currently holds plaintiffs note and, therefore, is attempting to collect debt owed by plaintiff to the Department, not to another. Plaintiff cites no authority to show that defendant may be considered a debt collection agency because it hires a private agency to collect its debts.

In sum, plaintiff's claim under the FDCPA against the Department of Education and such claim should be dismissed for lack of subject matter jurisdiction and for failure to state a claim for relief.

2. Tort claims

Although plaintiff's complaint uses language rooted in tort law,[124] plaintiff has represented the only statute under which she is suing is the FDCPA.[125] During her deposition, plaintiff also asserted that the "essence" of her suit was that defendant was "negligent" in handling her loans.[126] If plaintiff's complaint to contain tort allegations, notes that tort claims against a

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124 Plaintiff's complaint suggests the Department of Education has engaged in "negligence," "deception," "defamation," and that plaintiff has been "misrepresented." See docket no. 5.

125 Wagstaff Deposition at 17:2-20: 18.

federal agency fall within the scope of the FTCA which requires that an administrative claim be presented to and denied by the federal agency employing the person whose act or omission caused the injury.[127] Thus, exhaustion is a jurisdictional prerequisite in order to bring a tort claim against a government agency in federal court. [128]

Defendant has produced evidence indicating plaintiff has never filed an administrative tort claim against the Department of Education. [129] In response, plaintiff claims the Department of Education "did not mention" to plaintiff's she could or needed to file an administrative claim and "did not supply any supporting documents that mention. . . the process for filing an administrative tort claim."[130] Plaintiff does not explain why a dispute about a debt would create a duty on behalf of defendant to inform plaintiff she could file a tort claim. Nevertheless, plaintiff does not contest that she failed to file an administrative tort claim, a jurisdictional prerequisite which may not be waived.[131]

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126 Wagstaff Deposition at 19: 19-20.

127 28 U.S.C. § 2675(a).

128 Gregory v. Mitchell, 634 F.2d 199,203-204 (5th Cir. 1981).

129 Docket no. 44, exhibit 15.

130 Docket no. 49 at II. Plaintiff does not explain how a dispute over a debt would create a duty on the part of the agency to in form her about the need to file a tort claim.

131 Gregory v. Mitchell, 634 F.2d 199,203-04 (5th Cir. 1981).

In sum, to the extent plaintiff's complaint should be read as including a tort claim, the tort claim must be dismissed for lack of subject matter jurisdiction based on plaintiff's failure to exhaust administrative remedies

3. Summary. Judgment

Even if the Court did not lack subject matter jurisdiction, defendant would be entitled to summary judgment because there is no genuine issue of material fact as to any of plaintiff's claims. Specifically, there is no genuine issue of material fact that plaintiff took out student loans from 1991 to 1993, and she did not make any voluntary payments on the loans.[132] There is no genuine issue of material fact that the Department of Education is the current holder of the notes, as the loans were federally insured and the Government paid the lenders when plaintiff defaulted on the underlying debts and now is attempting to recover its losses by collecting from plaintiff on the original debt. There is no genuine issue of material fact defendant is not a "debt collector" as defined by the FDCPA.[133] Finally, plaintiff has not produced any evidence demonstrating that she has exhausted her administrative remedies with regard to the tort claims in her complaint. [134] As such, summary judgment is appropriate as to all of her claims because there is no genuine

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132 Docket no. 44, exhibits 1-6 and 8; Wagstaff Deposition at 12:3-15 and 27:1-2.
133 See 15 U.S.C. § I 692a(6).

issue of material fact as to any of plaintiff's claims.

4. Summary

Even if all factual allegations in plaintiff's complaint are accepted as true and construed in plaintiff's favor, the Court lacks subject matter jurisdiction over plaintiff's (a) FDCPA claim because the Department of Education is not a "debt collector" within the purview of the statute and (b) any tort claim because plaintiff did not exhaust her administrative remedies. Further, plaintiff's FDCPA claim, any tort claim, and complaint should be dismissed for failure to state a claim.[135] In the alternative, the Court also finds there is no genuine issue of material fact as to any of plaintiff's claims and the Department of Education is entitled to judgment as a matter of law.

VII. CONCLUSION

Based on the foregoing, the United States Department of Education's motion to dismiss, or, in the alternative, motion for summary judgment [136] is GRANTED and plaintiff's complaint is DISMISSED pursuant to Rules 12(b)(l) and (6), Fed. R. Civ.P., and, in the alternative, Rule 56,Fcd.R.Civ.P.

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134 See docket no. 49.
135 Canley, 355 U.S. at 45-46.78 S.Ct. at 102.
136 Docket no. 44.

ORDERED, SIGNED and ENTERED this
15th day of February, 2007.

"s/"
PAMELA A. MATHY
UNITED STATES MAGISTRATE JUDGE

No. 07_____

IN THE SUPREME COURT OF THE
UNITED STATES

AUDREY S. WAGSTAFF, Petitioner
v.

THE UNITED STATES DEPARTMENT OF
EDUCATION, Respondents

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURTS OF APPEALS FOR THE
FIFTH CIRCUIT

WRIT OF CERTIORARI MOTION TO REVIEW VIOLATIONS OF PROTECTIONS AND CONSTITUTIONAL AMENDMENT RIGHTS AND TO SUSPEND ALL THIRD PARTY DEBT COLLECTION AGENCIES INVOLVEMENT IN THE COLLECTION OF GOVERNMENT DEBT

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pro se

MOTION TO REVIEW VIOLATIONS OF PROTECTIONS AND CONSTITUTIONAL AMENDMENT RIGHTS AND TO SUSPEND ALL THIRD PARTY DEBT COLLECTION AGENCIES INVOLVEMENT IN THE COLLECTION OF GOVERNMENT DEBT

Now comes Audrey S. Wagstaff, Petitioner, pro se, to file a motion to review violations of protections and constitutional amendment rights and to suspend all involvement of third party debt collection agencies in the collection of government debt.

VIOLATION OF DEBT COLLECTION PROTECTIONS

It has been proven that The United States Department of Education, herein Education, violated Title 31in the collection of this alleged debt by collecting through Administrative Wage Garnishments, herein AWG, through the United States Department of the Treasury, herein Treasury, after the 10-year statue of limitation (901.3) and when a contracted third party debt collector, specifically NCO Financial Systems, Inc., (NCO), was involved in the collection of the alleged debt (901.5).

After I disputed the debt, The United States Department of Justice and a Federal Court determined the balance is $0.00 before dismissing the case. A "Notice of Legally Enforceable Debt" had to be filed

for Treasury to collect. Treasury is paid a fee for their services, which is collected from alleged debtors by government agencies. Government agencies have a responsibility to ensure that violations of protections and Court Orders are not being committed in the collection of alleged government debt.

An investigating is needed as to how "Notices of Legally enforceable debt" is constructed by (or on behalf of) government agencies and how they are implemented by Treasury before AWG and income tax offsets are activated.

CONSTITUTIONAL AMENDMENT RIGHTS VIOLATIONS

Constitutional Amendment Rights 5, 9 and 14 grant due process and equal protection which is being violated by The Debt Collection Improvement Act (DCIA) of 1996. Due Process is not provided and the courts lack subject matter jurisdiction.

The letter sent to my employer states, "YOU, the Employer, are hereby ORDERED to deduct from ...." Ordered by whom? No Court of law is listed. Listed is "U.S. DEPARTMENT OF EDUCATION" and they were determined to be protected.

The DCIA of 1996 requires a hearing, whether or not one is requested, before AWG are activated. It has not been disclosed as to who rules on the legitimacy of counterclaims and defenses. The contract with NCO Financial Systems, Inc. (NCO),

states (Page 11, sec. 3.3), "The Contractor shall determine if the borrower is eligible for possible AWG in accordance with Ed procedures." It also states (Page 2, sec. 1.1) that they are to "prepare eligible cases for ... Administrative Wage Garnishments (AWG)...." and the AWG hearing form states it is "...an attempt to collect a debt..." Contractors have a vested interest in the outcome and their involvement makes the hearings speculative, contributing to questionable actions.

Alleged debtors have no way of protecting themselves from Education allegations and debt collection practices and they are a violation of ones Constitutional Amendment Rights.

VIOLATION OF THE FAIR DEBT COLLECTION PRACTICES ACT (FDCPA)

Contracted third party debt collectors collecting on behalf of government agencies are unquestionable subject to the Fair Debt Collection Practices Act (FDCPA) (15 U.S.C. § 1692).

Third party debt collectors contacted my employer and requested protected and confidential information, which is a violation of the FDCPA. Education's AWG request referred my employer to NCO Financial Systems, Inc., disguised as a "Debt Collection Service Info. Center."

Education allowed a third party debt collector to request repayment though the

Treasury. In discovery, defendant states, "The Department of Education does not have copies of correspondance (correspondence) between NCO Financial Systems, Inc. and the Department of the Treasury and/or your employer." The contract holds NCO responsible for destroying confidential information, including what was received from my employer. Page 16, section 4.4, states, "The Contractor shall, ...destroy or dispose of, in a manner, which will prevent any unauthorized disclosure, any records containing personally identifiable information, which are not to be returned to ED."

The AWG hearing form states the hearing is "an attempt to collect a debt..." as debt collectors are required by the FDCPA to state in communications. An Education employee "approved" the AWG hearing, although it was in violation of debt collection regulations and the FDCPA.

Third party debt collectors do not have an independent contract and all communication is from or refers to a third party debt collection agency as the proper agent. Education refers to third party debt collectors as "our representatives." When I called Education and entering my Social Security number, I was automatically transferred, without notification, to a third party debt collector.

An investigation is needed to review the relationship between third party debt

collectors and Education and alleged debtors need to be informed of the actions of third party debt collectors, as many times they did not give consent.

The involvement of a third party makes Education's debt collection, and therefore Education, subject the FDCPA. An investigation is needed to determine the liability for violations.

THIRD PARTY DEBT COLLECTORS ACCESS TO PRIVATE PROTECTED INFORMATION

Government data banks, specifically Education's, have private and protected information about all who have applied for a government, specifically Education, loan. Third party debt collectors are given unlimited access to this information and are required to themselves "ensure" that they do not use said information inappropriately.

Section 6.1, page 22, of the contract between third party debt collection agency, specifically NCO Financial Systems, Inc., and Education states, "The contractor must obtain and install the telecommunications equipment necessary to interface with the ED System.." Page 23, section B, states, "...the Contractor shall establish and maintain its own computer system and software, which can accept and accommodate data on all ED accounts...." Third party debt collectors are not limited to only information pertained to debt collection, as the contract continues, "The

Contractor shall ensure that all ED data is protected from unauthorized disclosure while on the Contractor's computer system." The next paragraph states, "The Contractor shall ensure that the data in its system is used exclusively for collection activities related to ED transferred accounts."

In a motion to compel, I requested "Written notes, e-mails and notes of oral conversations, notes of telephone calls between the U.S. Department of Education and NCO Financial Systems, Inc..." Defendant Education responded, "All relevant documents have been provided," (DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION TO COMPEL II, dated 11-06-06). No proof of communication was provided. The L102 data screen is were debt collectors take notes of conversations with alleged debtors.

In response to discovery, defendant states, "There are no non-privileged e-mails, written notes, notes of telephone conversations, notes of oral conversations and/or recorded messages in any form other than the imputing data onto the L102 screen. We continue to contend that the e-mail messages authored by in-house counsel and or/my self are privileged and protected from disclosure." Thus one can conclude that Education does not communicate with third party debt collectors who are operating under Contract with them and have access to their data banks unless it is with in house counsel. According to the L102

data screen, violations of the FDCPA were committed "PER ED." If the only communication is with in house counsel, it can be reasonably concluded that in house counsel is the authority behind "PER ED" in the violations.

When I questioned Education as to whom (admittedly with in a 100-mile radius) would have information in order to testify in deposition, she stated "no one."

Although each conversation with third party debt collector states that it is being recorded, no recordings were provided. Due to the abuse I received from third party debt collectors, one would assume that they were aware that the calls were not actually being recorded, and if they were they would not be reviewed by Education.

Education has allowed third party debt collectors, who have unquestionably violated debt collection regulations and the FDCPA, to supervise themselves when accessing and the use of protected and confidential information. The use of third party debt collectors in the attempts to collect government debt should be suspended until government agencies can ensure alleged debtors that their private information is being protected from unauthorized use. I find the fact that NCO Financial Systems, Inc. was given access to my personal and private information disturbing, especially were I became aware that they have offices outside of the United States, were U.S. law is not enforceable.

SOVEREIGN IMMUNITY AND THE COLLECTION OF GOVERNMENT DEBT

If the Court's ruling is to give sovereign immunity to government agencies for the collection of government debt, then the use of third party debt collection agencies, which are unequivocally subject to the FDCPA, should be permanently suspended and government employees should list their name, title, phone number and signature.

If the government employees are to be protected, then it should be clear and concise as to which employee is responsible for the debt collected. The employee should be accountable for violations. This should be immediately implemented.

CONCLUSION

The Debt Collection Improvement Act of 1996 is a violation of constitutional amendment rights, by giving a government agency the "right" to collect debt with out the burden of proving the legitimacy of the debt. Remanding alleged debtors, who have proven violations, back to the government agency, who while "enjoying their sovereign immunity" who are part of the violations, is not equal protection and still allows the government agency to be the final judge, jury and executioner and does not deter future violations. The Administrative Wage Garnishment Hearing is bias before it

begins and does not constitute equal protection or due process. Forcing alleged debtors and their employers to reveal personal and confidential information to third party debt collectors and granting third party debt collectors' access to confidential and personal information is a violation of the Privacy Act. Allowing a government agency to "Order" an employer to with hold income without a Court order or equal representation is a violation of due process. Involving third party debt collectors in the attempts to collect debt and then collecting through the Treasury department is a violation of Title 31, especially increasing the amount of alleged debt for their compensation. Having no one accountable for violations of the FDCPA is unconstitutional. Allowing government agencies to execute forced repayment and them preventing access to a Court of Law to have the violations addressed is a violation of equal protection. Allowing government agencies to remain sovereign after forcing alleged debtors into repayment is not equal protection, as the government agency initiated the actions without due process. The inability to enforce the rights and protection afforded alleged debtors unless to be able to have the United States Supreme Court accept a Wit is not Justice.

Government debt collection practices are a violation of alleged debtors' constitutional amendment rights and should be reviewed and changes made to include

due process and equal protection under the law. The use of third party debt collectors should be immediately suspended and government employees should identify themselves and be accountable for debt collection.

The gravity and severity of the situation is escaping the Justice system. Education has mastered a way to circumvent the protections afforded to alleged debtors and have escaped responsibility. It is financially difficult to defend oneself against government actions, especially with a 15% garnishment. A full and complete investigation is necessary to protect the rights of alleged debtors who are powerless to protect themselves.

In the name of public interest and the rights of alleged debtors who have been violated by government debt collection practices and third party debt collectors operating on their "behalf," I am requesting that this motion be granted.

Respectfully submitted,

Audrey S. Wagstaff

Audrey S. Wagstaff,
Petitioner, pro se